United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1252

To be argued by
LUDWIG A. SASKOR

United States Court of Appeals

FOR THE SECOND CIRCUIT

AMERICAN AIRLINES, INC.,

Plaintiff-Appellant,

—against—

AERLINTE EIREANN TEORANTA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE

SMITH, STEIBEL & ALEXANDER
Attorneys for Defendant-Appellee
460 Park Avenue
New York, New York 10022
PLaza 1-2660

LUDWIG A. SASKOR
STUART B. FISHER
Of Counsel

New York, New York
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Issues Presented

1. Did the District Court correctly hold, on the basis of undisputed and unambiguous documents, that the claims asserted in the first four causes of action of the amended complaint raised issues which had already been raised and determined in the arbitration, and that American was barred from relitigating these issues?

2. Where the aircraft leasing Agreement prescribed a detailed procedure for determining registrability of the Aircraft, and relieved TCA from liability if the Aircraft could not be registered after following this procedure, did the District Court correctly hold that TCA's failure to comply with this prescribed procedure barred American from seeking to avoid liability under the Agreement on the ground of alleged non-registrability of the Aircraft?

3. By failing to raise the issue of non-registrability of the Aircraft in its pre-arbitration petitions, in which it sought a stay of arbitration and a declaratory judgment that it had no further obligations under the Agreement, and

thereafter affirmatively submitting the registration issue to arbitration, did American waive any right to attack the arbitrators' determination of that issue?

4. If American did not waive any right to attack the arbitrators' determination of the registration issue, could it collaterally attack that determination by means of a declaratory judgment action?

5. Did the District Court correctly dismiss the fifth cause of action, which asserted that Section 9.2 of the Agreement, which gives Irish substantially the same relief it would have as a matter of law, was a penal provision and unenforceable under New York law?

The Action

This is an appeal from the dismissal, on the merits, of a declaratory judgment action brought by plaintiff-appellant, American Airlines, Inc., the day after delivery of an arbitration award in favor of defendant-appellee, Aerlinte Eireann Teoranta ("Irish").

The arbitration was held pursuant to an arbitration clause in an aircraft leasing agreement between Irish and Trans Caribbean Airways, Inc. ("TCA"), American's predecessor in interest, following unsuccessful attempts by TCA in the New York courts to stay arbitration and to obtain a declaratory judgment that it had no further obligations under the Agreement.

In the District Court action, American sought a declaratory judgment that notwithstanding the arbitration award, Irish was not entitled to collect any rents under the Agreement or damages with respect thereto.

Following service of the complaint, Irish moved for dismissal pursuant to Rule 12 of the Federal Rules of Civil Procedure. Before the motion was heard, American served an amended complaint. Irish asked that its motion be deemed to apply to the amended complaint, and this request was granted.

In an opinion of December 14, 1973, Judge Inzer B. Wyatt, treating the motion as one for summary judgment under Rule 56, held that the claims asserted in the amended complaint were without merit and that Irish was entitled to summary judgment. On December 17, 1973, judgment was entered pursuant to Judge Wyatt's decision.

Following the entry of judgment, American moved for reargument. In an order of January 10, 1974, Judge Wyatt granted reargument and upon reargument adhered to his original decision.

On January 15, 1974, American filed a notice of appeal in which it purported to appeal from both the original judgment and the order on reargument.

On February 20, 1974, Irish moved in this Court to dismiss American's appeal from the order on reargument. By order of March 5, 1974, this Court denied the motion "without prejudice to renewal before the panel of judges who will hear the appeal."

Statement of Facts

A. *The Parties*

American, a Delaware corporation, is a domestic air carrier engaged in interstate and foreign air transportation ("foreign" air transportation being here defined as being between U.S. points and foreign points). It is successor by merger to TCA (A 3-4).

Irish, an Irish corporation, is a foreign air carrier engaged in transatlantic air transportation (A 3).

Prior to its merger into American, TCA was a Delaware corporation and a domestic air carrier engaged in interstate and foreign air transportation between the eastern United States and the Caribbean (A 4).

In January 1970, American and TCA entered into a merger agreement under which TCA was to be merged into American, subject to various corporate and governmental approvals. The merger was consummated in March 1971. (A 164).

B. *Pre-Agreement Background*

Prior to entering into the aircraft leasing agreement with TCA in 1968 ("the Agreement"), Irish had leased several of its aircraft to domestic U.S. carriers. The Federal Aviation Administration ("FAA") had registered all of these foreign-owned aircraft in the name of the U.S. lessee. (A 237-238).

Two of the prior leases of Irish aircraft to U.S. carriers were between Irish and TCA. The leased aircraft were registered in TCA's name with the FAA, and operated on TCA's routes. (A 238).

It was FAA practice to help parties to an aircraft transaction register the aircraft in the manner desired by the parties (A 244). In one of the prior leases between Irish and TCA, the lease agreement was initially not accepted by the FAA because the option to purchase was exercisable only at a specific point in time. The FAA suggested that the lease agreement be amended to make the option exercisable throughout the lease term. The suggested amendment was made, and the foreign-owned aircraft was then registered by the FAA. (A 244).

C. *The Agreement*

The Agreement was entered into on February 8, 1968. It covered two Boeing 747 jumbo jet aircraft which Irish then had on order with the manufacturer (the "Aircraft"). TCA was to lease the Aircraft during the winter months, its busy season, over a 4½ year period commencing in November 1970 and ending May 15, 1975 (A 13-42, 160). Both parties were represented by counsel in the negotiation of the Agreement. (A 197-198).

At the time the Agreement was negotiated and entered into, the 747 (which was not yet in operation) was being heralded as a plane that would change the economics of the airline industry. Orders were so heavy that the lead time for delivery from the manufacturer was several years. (A 237).

Irish had the Aircraft on order for delivery in November 1970 and March 1971 (A 13). TCA was to lease the first aircraft immediately following delivery from the manufacturer, and the other aircraft after it had been operated by Irish for a few months (A 243). Under the Agreement, TCA had an option to purchase either or both Aircraft on 60 days notice. The options could be exercised during any lease period. (A 36).

The Agreement was beneficial to TCA in a number of respects. One of these benefits was that it enabled TCA, a relatively small domestic carrier, to compete successfully with much larger carriers (Pan American and Eastern) on the highly competitive Caribbean route (A 243).

The monthly rent payable by TCA is determined by a formula set forth in the Agreement. The rent is not based on, or related to, the revenues derived by TCA from opera- of the Aircraft.

The Agreement consists of three documents: The main agreement (A 13-29); a prescribed lease form, which constitutes an exhibit to the Agreement (A 30-39); and Letter Agreement No. 1 (A 40-41). (Section references to the main agreement will refer to "the Agreement." References to specific sections of the lease form or Letter Agreement No. 1 will specifically identify those documents.)

Under Section 11 of the Agreement, TCA made a number of representations, warranties and covenants, including the following (A 24-25):

> "SECTION 11: REPRESENTATIONS AND WARRANTIES OF TCA
>
> "TCA represents, warrants and covenants to AET:
>
> • • •
>
> "11.2—• • • This agreement and any lease to be entered into pursuant hereto . . . constitute and will constitute . . . the valid and binding obligation of TCA enforceable in accordance with their terms.

"11.3—There is to its knowledge no law, governmental rule, regulation or order . . . which would be contravened by the execution, delivery or performance by TCA of the terms of this agreement and any lease to be entered into pursuant hereto.

• • •

"11.5—No registration with, . . . or consent or approval of any governmental agency or commission is necessary for the execution, delivery or performance by TCA of the terms of this Agreement or any lease to be entered into pursuant hereto or for the validity or enforceability thereof or with respect to the obligations of TCA thereunder insofar as TCA is concerned or if required, TCA shall use its best efforts to promptly obtain all such registrations, . . . and approvals . . . .

"11.6—Neither the execution nor delivery of this Agreement or any lease entered into pursuant hereto nor fulfillment of or compliance with the terms and provisions thereof will contravene any provision of law • • •"

The Agreement prescribes a detailed procedure with respect to registration of the Aircraft, and specifies the consequences if the prescribed procedure is followed and the Aircraft cannot be registered:

1. In Section 4.1 of the lease form, TCA is required to "use its best efforts to . . . effect registration of the Aircraft under Section 501 of the United States Federal Aviation Act of 1958, as amended" (A 32).

2. Under Section 19.2 of the lease form, if TCA, "notwithstanding [its] best efforts and for reasons beyond its control," is unable to register the Aircraft, and if certain other conditions are met, the lease terminates without liability (A 38-39). Under paragraph "6" of Letter Agreement No. 1, taken together with Section 13.1 of the Agreement, if such termination

occurs during the Initial Period and the parties despite their best efforts cannot cure the registration defect, the entire Agreement terminates without liabilit to TCA, and TCA is entitled to a refund of any payments made thereunder (A 41, 26).

Under Section 9.1 of the Agreement, if TCA fails to perform specified acts or correct specified defaults within a prescribed number of days after notice, or upon the occurrence of prescribed financial conditions such as adjudication of bankruptcy, there is an "Event of Default" (A 19-21). The form of notice is prescribed in Section 13.6.

Under Section 9.2, Irish is given specified remedies upon the occurrence of an Event of Default (A 21-23b). The remedies must be exercised while the Event of Default is continuing (A 21). One of these remedies is the right to terminate the term of the Agreement (A 21).

Where Irish has exercised such right of termination, TCA remains liable for the rents and other charges under the Agreement as they fall due. If the Aircraft are relet to another carrier, the net proceeds of such reletting are credited to TCA. Where the Aircraft are used in the operations of Irish or its affiliated company, TCA receives a 50% credit. The credits are computed and payable at the expiration of the normal term of the Agreement. (A 22-23a).

D. *Termination*

On September 2, 1970, Irish terminated the term of the Agreement on the ground of Events of Default on the part of TCA (A 67-68). TCA denied that it was in default, and shortly thereafter tendered an overdue advance payment and executed and tendered the Initial Period lease, which was also overdue (A 68).

Irish rejected TCA's post-termination tenders, and on September 23, 1970, demanded arbitration of the default dispute pursuant to an arbitration clause in the Agreement (A 65-69).

E. *Pre-Arbitration Court Proceedings*

On October 2, 1970, TCA filed a petition in the New York Supreme Court seeking a stay of arbitration and a declaratory judgment (A 63-73). The petition recited Irish's termination, TCA's post-termination tenders of performance and Irish's rejection of those tenders (A 68-69). The petition also referred to Irish's remedies under the Agreement, and alleged that "some of [the remedies] are unconscionable" (A 69). TCA's request for a declaratory judgment sought, among other things, a declaration that Irish "wrongfully terminated and repudiated the Agreement and that TCA has no further obligation to AET thereunder" (A 71).

The New York Supreme Court granted a stay of arbitration, on the ground that the arbitration demand did not disclose the nature of the dispute, without prejudice to the service of a proper demand. The Court did not pass upon TCA's request for a declaratory judgment. (A 74).

On October 15, 1970, Irish served a new arbitration demand (A 75-76). The new demand set forth the following as the nature of the dispute and the relief sought:

> "NATURE OF DISPUTE: Whether or not, on September 2, 1970, Trans Caribbean Airways Inc. was in default under the Contract in the following respects:
>
> "1. Failure and refusal to pay the sum of $85,000 due July 1, 1969;
>
> "2. Failure and refusal to execute the lease tendered by Aerlinte Eireann Teoranta for Plane No. 1;
>
> "3. Failure and refusal to use its best efforts to promptly obtain all required registrations with and approvals of governmental agencies;
>
> "4. Failure and refusal to do and perform such other and further acts as required by law and reasonably requested by Aerlinte Eireann Teoranta to carry out and effect the intents and purposes of the Contract and the leases required to be executed thereunder.

"CLAIM OF RELIEF SOUGHT: A declaration:

"a) that Trans Caribbean Airways Inc. was in default under the terms of the Contract; and

"b) that in terminating the term of the Contract Aerlinte Eireann Teoranta followed the procedures prescribed under the Contract."

On October 23, 1970, TCA filed an amended petition in the New York Supreme Court directed to the second arbitration demand (A 77-88). The amended petition also sought a stay of arbitration and a declaratory judgment, and contained substantially the same allegations and request for relief as the original petition. These allegations included the following:

"11. On September 3, 1970 TCA cabled a reply to AET's attempt to terminate the Agreement. TCA denied it was in default and confirmed its willingness to perform its obligations under the Agreement. * * *

"12. On September 4, 1970, AET's New York counsel returned TCA's $85,000 check, claiming that the Agreement between the parties had been terminated. Thereafter on September 9, 1970 AET advised TCA that it would not accept the executed lease transmitted by TCA on September 4, 1970 since AET had terminated the Agreement.

* * *

"17. * * * Section 9.2 . . . provides in part that 'If one or more events of default enumerated in Section 9.1 shall occur, and while such event of default shall be continuing, then and in any such event . . .' AET may take certain action and seek certain remedies as set forth in said Section. These remedies, some of which are unconscionable, include among other things, immediate repossession of the aircraft, and immediate collection of various rents and expenses. * * *

* * *

"25. By reason of the foregoing AET wrongfully and in bad faith terminated and repudiated the Agreement.

"26. A case and controversy exists between TCA and AET as to AET's rights to terminate and repudiate the Agreement and as to the rights of TCA as a consequence of said termination and repudiation. * * * "

TCA's petitions for a stay of arbitration and declaratory judgment were filed during the pendency of the merger, at a time when TCA was receiving financial assistance from American. TCA was represented in the State court proceedings by American's counsel. (A 52).

Commencing in July 1970, some three months prior to the filing of TCA's petitions, American advised both Irish and TCA of its position that the Aircraft were not registrable (A 52-53, 101-102). In August 1970, American applied to the FAA's Washington office for an opinion on registrability of the Aircraft, at which time it advised the FAA of its (American's) counsel's opinion that the Aircraft were not registrable (A 165, 212).

The registration issue was not raised in either of TCA's petitions for a stay of arbitration and declaratory judgment, filed in October 1970.

TCA's motion to stay arbitration under the second arbitration demand, supported by its amended petition for a stay of arbitration and declaratory judgment, was submitted to the New York Supreme Court on November 12, 1970. A week earlier, on November 3, 1970, an Acting Associate General Counsel of the FAA, Oscar Shienbrood, in response to American's request for an opinion on registrability of the Aircraft, sent a letter to American's Oklahoma City counsel stating the conclusion that the Agreement "should not be treated as affecting a conditional sale of the aircraft to TCA for purposes of registration" and that "TCA would not be considered the owner of the air-

craft for registration purposes" (A 142-45). American and TCA were immediately advised of the Shienbrood letter. They did not bring the Shienbrood letter to the attention of the court, or otherwise raise the registrability issue, prior to submission of the motion (A 51-52). Nor did they do so during the one month period that the motion was under submission (A 52).

On December 7, 1970, the New York Supreme Court issued its decision, in which it (1) denied a stay of arbitration, and (2) held that TCA's request for a declaratory judgment "is covered by the arbitration clause and is for the arbitrator to determine." (The court also noted that it had no jurisdiction over Irish with respect to the request for a declaratory judgment "in the absence of proper process".) (A 89-91). TCA did not seek reargument or reconsideration of its motion on the basis of the Shienbrood letter or on the ground of alleged non-registrability of the Aircraft (A 52).

On appeal, the decision of the New York Supreme Court was unanimously affirmed by the Appellate Division of the New York Supreme Court. Leave to appeal to the New York Court of Appeals was denied by the Appellate Division and by the Court of Appeals.

The arbitration hearing commenced approximately one year later, in December 1971. During this one year period, in which the merger was consummated (in March 1971), neither TCA nor American sought any further stay of arbitration or declaratory judgment on the basis of the Shienbrood letter or on the ground of alleged non-registrability of the Aircraft. (A 52).

F. *The Arbitration*

On January 25, 1971, TCA, acting through American's lawyers, filed an Answering Statement in the arbitration (A 110-114). The Answering Statement contained three parts: (1) a denial of Irish's claims of default; (2) affirmative defenses; and (3) a counterclaim. It provided in part:

"ADDITIONAL DEFENSES

"5. AET is estopped from obtaining a declaration that TCA was in default for the reasons referred to in '1' and '2' above, and from relying on such events of default, since AET acted in bad faith in terminating the Agreement. * * * In this proceeding AET seeks a declaration as to TCA's defaults in order to hold TCA responsible for damages under the Agreement on the premise that the aircraft could lawfully have been registered in the United States and the Agreement performed, even though the Federal Aviation Administration on November 2, 1970, two months after AET's bad faith termination, ruled that the aircraft could not be so registered.

"6. AET is estopped from obtaining a declaration as to the alleged defaults referred to in '3' and '4' above, and from relying on such events of default, because it terminated the Agreement in bad faith and thereafter arbitrarily refused to join with TCA to obtain a ruling on registration of the aircraft. * * *

"7. AET's claims as to defaults are moot since regardless of whether such defaults occurred TCA's obligations under the Agreement and the Agreement itself would have been terminated because the aircraft were not lawfully registrable in the United States.

* * *

"TCA'S COUNTERCLAIM FOR RELIEF

"10. By reason of AET's conduct as described above, TCA is entitled to a declaration that the Agreement is terminated, that it has no further obligations thereunder, and that it is entitled to a refund of advance payments previously made plus interest, together with such other and further relief as may be appropriate. In the alternative, TCA is entitled to such a declaration because the aircraft were not lawfully registrable in the United States. * * *"

The merger of TCA into American was consummated six weeks after the filing of TCA's Answering Statement, and nine months prior to commencement of the arbitration hearing. The Answering Statement was not withdrawn or amended by American. American, as TCA's successor, proceeded to arbitration on the issues raised by Irish's second arbitration demand and TCA's Answering Statement.

The arbitration hearing commenced in December 1971 and continued intermittently until July 1972. There were thirty days of hearing, comprising almost 6,000 pages of transcript. Over 200 exhibits were introduced into evidence. The arbitrators were three lawyers. (A 55).

American's presentation in the hearing focused on its claim that the Aircraft were not lawfully registrable in the United States. Three of American's witnesses, purporting to testify in part as experts, testified that in their opinion the Aircraft were not lawfully registrable in the United States. American's chief expert witness was on the stand for six days. (A 55, 235).

Irish also introduced evidence on the registration issue. It pointed out, *inter alia*, that the opinion expressed in the Shienbrood letter was contrary to long-standing FAA practice and contrary to prior opinions of the FAA interpreting the same statute and same regulations (A 120-122, 212-213). Irish also introduced evidence that less than a month prior to American's formal request to the FAA Washington Office for a written opinion on registrability, FAA counsel at the FAA Aircraft Registry in Oklahoma City—the FAA Office which handles registration of aircraft and normally deals with registration questions—had reviewed the Agreement and given a verbal opinion that the Aircraft were registrable (A 245-246).

Following the close of the hearings and oral argument, American filed a closing brief in the arbitration, in which it argued, *inter alia* (A 115-118):

"(3) *The Statute and Regulations.* The registration requirement is found in Section 501 of the Federal Aviation Act, 49 U. S. C. § 1401 (Ex. 46), which makes it unlawful to operate an aircraft in the United States unless it is registered by the owner, and the owner must be a United States citizen. Under Section 47.5(c) of the Regulations (Ex. 47), the term "owner" is defined to include a lessee of an aircraft under a contract of conditional sale.

"A basic part of the legislative policy behind the registration requirement is known as the principle of 'cabotage' (L 2784-89) (Gad. 4507-08). It originated in maritime law and, simply stated, is that foreign-owned aircraft cannot fly between 'capes' or points in the same country. The same principle underlies Section 1108 of the Federal Aviation Act, 15 U. S. C. § 1508, which was discussed in the letter from Eastern's counsel referred to in the footnote on p. 31, *supra.* See *Petition of Qantas,* 29 Civil Aeronautics Board Reports 33 (1959); Kingsley, *Nationality of Aircraft,* 3 Journal of Air Law and Commerce 50, 51 (1932); Convention on International Civil Aviation (Chicago Convention), December 7, 1944, Art. 7, 61 Stat. 1182;* *cf. Central Vermont Transportation Co.* v. *Durning,* 294 U. S. 33, 41 (1935) ("long established national policy to restrict . . . foreign control of coastwise shipping"); *Marine Carriers Corp.* v. *Fowler,* 429 F.2d 702 (2d Cir. 1970) ("Like all maritime nations . . . the United States treats its coastwise shipping trade as a jealously guarded preserve.").

"The TCA-AET lease arrangement ran directly contrary to the cabotage principle, since an aircraft owned by a foreigner, AET, would have been flying

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"* Article 7 of the Chicago Convention specifically relates to 'cabotage' and provides, in part, that 'each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory.' More than 120 nations, including Ireland and the United States, have signed the Convention. * * *"

on TCA's U. S. cabotage routes. By this method AET, a foreign carrier, would have been using domestic commerce (through receipt of rent from TCA) to finance the purchase of its aircraft (L 2786-88, 2872-73). Indeed, the rental to be paid by TCA was based directly on the payments of AET's depreciation and capital charges for the aircraft (Gl. 37-38, 176-77) (M 922-23) (Ex. B1).

"The unrebutted testimony of Gaddis, as well as the FAA opinion (Ex. 48), demonstrate that TCA could not lawfully register the aircraft because it was not purchasing them under a conditional sales contract. The payments (that is, rentals) which TCA was obligated to make were not 'substantially equivalent' to the value of the aircraft (that is, the rentals plus the option price) (Gad. 4487-93). The option price was not nominal, as required by the Act and common law (Gad. 4491, 5177), but was 115% of the cost of a new and different aircraft.

• • •

"D. AET's virtually conceded purpose in terminating was and is to obtain from TCA, as damages under the Agreement, the rents it could not lawfully have obtained under the lease because the aircraft could not be registered in the United States. AET seeks a ruling in this arbitration that the termination was authorized, in order to use that ruling in court as a basis for claiming damages. Such a ruling for AET cannot possibly be justified. Furtherfore, the result AET seeks would violate the registration and cabotage principles, since AET would be obtaining indirectly as damages what it could never have lawfully obtained as rent.

"IV. TCA Is Also Entitled to a Refund Of its Advance Payments, With Interest.

"Because AET wrongfully terminated the Agreement, TCA is entitled to a refund, with interest, of its advance payments of $335,000. See *Boyce* v. *Barrett*, 258 F. 2d 640 (3d Cir. 1958).

"In the alternative, TCA is entitled to the same relief, without interest, pursuant to section 13.1 of the Agreement and paragraph (6) of Letter Agreement No. 1, since, as stated in the FAA opinion of November 1970 (Ex. 48), the foreign-owned aircraft could not lawfully be registered in the United States. * * *"

G. *The Award*

On January 3, 1973, the arbitrators rendered a unanimous award in which they found for Irish and against TCA (A 204-205). The award stated, in part:

"WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated February 8, 1968 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD, as follows:

"1—There was an event of default on the part of TRANS CARIBBEAN AIRWAYS, INC., hereinafter referred to as RESPONDENT, as of September 2, 1970 (the date of termination by AERLINTE EIREANN TEORANTA, (hereinafter referred to as CLAIMANT) on the grounds of:

"a) RESPONDENT'S failure to pay to CLAIMANT the sum of EIGHTY FIVE THOUSAND DOLLARS ($85,000.00) due, pursuant to the agreement as of July 1, 1969;

"b) RESPONDENT'S failure to execute the lease for the initial period;

"c) RESPONDENT'S failure to use its best efforts to register the aircraft;

"d) That CLAIMANT followed proper procedure in effectuation of cancellation.

"2—RESPONDENT'S counterclaim is dismissed.

* * *

"5—This AWARD is in full settlement of all claims and counterclaims submitted to this Arbitration. * * *"

H. *Post-Arbitration Court Proceedings*

The arbitration award was delivered to the parties on January 17, 1973 (A 60).

On January 18, 1973, American filed its original complaint for a declaratory judgment in the District Court (A 58-62). The original complaint contained two causes of action. The crux of the first cause of action is contained in paragraph "13" thereof, which reads:

> "13. Enforcement of the arbitrators' award would permit AET to circumvent the aforesaid FAA ruling and permit AET to benefit from a contract, the performance of which would have been unlawful and contrary to public policy. Further, such enforcement would be contrary to and in violation of the provisions of the Federal Aviation Act."

The second cause of action alleges that performance of the Agreement became impossible by reason of the FAA "ruling" of November 3, 1970, and therefore Irish suffered no damages on account of TCA's defaults. In its prayer for relief, American asked for a declaration that Irish may not recover any damages or rents as a result of TCA's defaults, "or as a result of the arbitrators' award."

On January 19, 1973, Irish moved in the New York Supreme Court for confirmation of the award. As required by New York procedure, the motion was brought in the same proceeding which TCA had instituted prior to the arbitration in requesting a stay of arbitration and declaratory judgment. American opposed the confirmation motion and asked the New York Supreme Court to vacate the award on several grounds. Initially, the grounds asserted by American did not include non-registrability of the Aircraft. (A 94-100).

On February 6, 1973, Irish moved in the District Court to dismiss the original complaint pursuant to Rule 12 of the Federal Rules of Civil Procedure, on the following grounds: (1) that the complaint failed to state a claim under the Declaratory Judgment Act; (2) that the com-

plaint constituted an improper collateral attack on an arbitration award; (3) that the New York courts had exclusive jurisdiction over any controversy relating to the arbitration; (4) waiver; and (5) res judicata. The motion also sought such other, further and different relief as the Court might deem just and proper. (A 43-57).

On February 21, 1973, prior to hearing of the motion, American filed an amended complaint (A 3-10). The motion was deemed to apply to the amended complaint.

The amended complaint contains five causes of action. The first three causes of action are based on the claim that the Aircraft are not lawfully registrable in the United States. The fourth cause of action is based on the claim that Irish's termination was "improper and unconscionable," and that any loss of rentals or other damages resulted from such improper termination and not from TCA's immaterial defaults. The fifth cause of action alleges that Section 9.2 of the Agreement is a penal provision and unenforceable under New York law.

On March 7, 1973, the New York Supreme Court rendered a decision confirming the award (A 221-222).

On March 9, 1973, prior to the argument and submission of Irish's motion to dismiss the complaint in the District Court, American moved in the State court for reconsideration of the confirmation motion, and asked the State court to vacate the award, on the ground, *inter alia,* that if the arbitrators decided the Aircraft were registrable, such determination was contrary to federal law and public policy (American also asserted that the arbitrators had not determined the registration issue, and alternatively asked for clarification of the award) (A 224-233). The moving affidavit in support of the motion for reconsideration alleged, in part (A 228-233):

> "AN AWARD CANNOT BE CONTRARY TO PUBLIC POLICY AND FEDERAL LAW
>
> "9. It has long been held that confirmation of an award should be denied pursuant to the Court's gen-

eral equity powers where an award is contrary to the public policy of the state or of the United States. • • • If the instant arbitration award were held to constitute a determination that the foreign-owned aircraft could be lawfully registered in the United States, or that remedies could be awarded on such an assumption, the award would plainly violate the Federal Aviation Act and the public policy of this country.

"10. Section 501 of the Federal Aviation Act makes it unlawful to operate an aircraft in the United States unless it is registered by the owner. Furthermore, the Act requires that the owner be a citizen of the United States. A basic part of the legislative policy behind the registration requirement is known as the principle of 'cabotage'. It originated in maritime law and, simply stated, is that foreign-owned aircraft cannot fly between 'capes' or points in the same country and cannot compete in domestic air traffic with aircraft owned by United States citizens. The same principle underlies Section 1108 of the Federal Aviation Act, 15 U. S. C. § 1508. See *Petition of Qantas,* 29 Civil Aeronautics Board Reports 33 (1959); Kingsley, *Nationality of Aircraft,* 3 Journal of Air Law and Commerce 50, 51 (1932); Convention on International Civil Aviation (Chicago Convention), December 7, 1944, Art. 7, 61 Stat. 1182. Compare the similar maritime policy discussed in *Central Vermont Transportation Co.* v. *Durning,* 294 U. S. 33, 41 (1935), and in *Marine Carriers Corp.* v. *Fowler,* 429 F. 2d 702 (2d Cir. 1970).

• • •

"• • • In short, it was clear that TCA was not the owner and was not acquiring the aircraft under a conditional sales contract. Consequently, the aircraft could not have been registered under any circumstances.

• • •

"• • • If, as AET claims, the arbitration award constituted a determination as to registrability of the aircraft, such a determination was contrary to federal

law and public policy, and therefore exceeded the scope of the arbitrators' power. For that reason it should be vacated.

• • •

"WHEREFORE, it is respectfully submitted, for the reasons started in this affidavit and for the reasons previously stated in my affidavit, sworn to January 26, 1973, that the award herein be vacated or, in the alternative, that this Court's decision, dated March 7, 1973, be clarified."

On June 4, 1973, the State court denied the motion for reconsideration, stating: "The Court is not persuaded that its original determination should be changed."

On June 19, 1973, the New York Supreme Court entered an order and judgment confirming the arbitration award and denying American's motion for reconsideration.

On December 14, 1973, in the District Court action, Judge Wyatt, treating Irish's motion as one for summary judgment, held that the claims asserted in the amended complaint were without merit and that Irish was entitled to summary judgment: (1) The first four causes of action were held to be barred on the ground that the issues raised therein had been raised in the arbitration and there determined adversely to American. (2) The fifth cause of action was held to be barred by TCA's warranties in Section "11" of the Agreement. (3) The first three causes of action were also held to be barred on the ground that the parties had provided in the Agreement for a specific procedure for securing registration and the consequences if such procedure did not result in registration, and this procedure had not been followed because of TCA's defaults as found in the arbitration, including TCA's failure to execute the Initial Period lease and its failure to use best efforts to register the Aircraft. He also found that none of the further conditions to termination of the Agreement without liability to TCA, had been met by TCA. (A 256-268).

Judge Wyatt also stated that if any of American's claims did have any merit and did survive the arbitration, these

claims could be better determined in the action which Irish had instituted in the District Court to collect its rents under the Agreement, and that he would exercise his discretion to decline jurisdiction of the declaratory judgment action (A 267-268).

On December 21, 1973, American moved for reargument. In support of its motion, American submitted a memorandum which set forth a number of alleged facts that were not before the District Court on the original motion (A 270-297). By order dated January 10, 1974, Judge Wyatt granted reargument and on reconsideration approved and confirmed his original decision and opinion (A 326).

On January 17, 1974, in the State court proceeding, the Appellate Division of the New York Supreme Court unanimously affirmed the order and judgment which confirmed the award and denied American's motion for reconsideration. —— A.D.2d ——, 352 N.Y.S.2d 419. Leave to appeal to the New York Court of Appeals was denied by the Appellate Division on March 7, 1974, and by the New York Court of Appeals on July 15, 1974.

ARGUMENT

I.

The claims asserted in the first four causes of action were raised and determined in the arbitration, and cannot be relitigated.

Judge Wyatt held that summary judgment was required on the first four causes of action of the amended complaint, because they "raised issues already determined against plaintiff in the arbitration" (A 265). This holding was correct. See *Ritchie* v. *Landau*, 475 F.2d 151 (2d Cir. 1973); *Springs Cotton Mills* v. *Buster Boy Suit Co.*, 275 App. Div. 196, 88 N.Y.S.2d 295 (1st Dept. 1949), *aff'd*, 300 N.Y. 586, 89 N.E.2d 877 (1949).

A. *First, Second and Third Causes of Action.*

(1) The Registration Issue Was Submitted to the Arbitrators. The first three causes of action of the amended complaint are based on the proposition that the Aircraft "could not have been lawfully registered in the United States" (A 9). The same proposition was asserted, both by way of defense and by way of counterclaim, in TCA's Answering Statement in the Arbitration.*

It is the pleadings that determine the issues in an arbitration. See *Ritchie* v. *Landau, supra,* 475 F.2d at 154; *Feinstein* v. *Carl-Dress Corp.,* 156 N.Y.S.2d 636, 638-639 (cited at page 18 of American's brief). Here, the arbitration pleadings consisted of the second arbitration demand and the Answering Statement. The issues having been thus framed by the demand and the Answering Statement, there was no need for the District Court to review the hearing record.

If there was anything in the hearing record which supported American's claim that the registration issue was not submitted to the arbitrators, or that they did not decide that issue, it was incumbent on American, who was seeking to contradict the Answering Statement, to call that portion of the record to the District Court's attention. *New York Lumber and Wood Working Co.* v. *Schneider,* 119 N.Y. 475, 480, 24 N.E. 4 (1890). It did not attempt to do so.

American cannot rely on an explanation of its subjective purpose in concentrating on the registration issue in the arbitration, or speculation on the "reasonableness" of submitting this issue to the arbitrators (AA Brief 17-18), since no such limitations or qualifications were expressed in the Answering Statement. See *Ritchie* v. *Landau, supra,* 475 F.2d at 154.

American's present position is also inconsistent with its Post-Hearing Memorandum, submitted to the arbitrators *after* presenting evidence on the registration issue. In that

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* American was not "required" to file any answering statement (AA Brief 10). See Section 7 of the Commercial Arbitration Rules, American Arbitration Association.

Memorandum, American argued the registration issue at length (A 115-118) (Irish also argued the registration issue in its closing brief to the arbitrators; A 120-123). For example, the first cause of action of the amended complaint is a virtual restatement of the following argument from the Post-Hearing Memorandum (A 118):

> "D. AET's virtually conceded purpose in terminating was and is to obtain from TCA, as damages under the Agreement, the rents it could not lawfully have obtained under the lease because the aircraft could not be registered in the United States. AET seeks a ruling in this arbitration that the termination was authorized, in order to use that ruling in court as a basis for claiming damages. Such a ruling for AET cannot possibly be justified. Furthermore, the result AET seeks would violate the registration and cabotage principles, since AET would be obtaining indirectly as damages what it could never have lawfully obtained as rent."

The cases cited by American (AA Brief 17-18) do not support its position. In *Ungar* v. *Mandell*, 471 F.2d 1163, and *Kittinger* v. *Churchill*, 292 N.Y. Supp. 35, the issues claimed to have been adjudicated were not raised in the pleadings of the prior action (neither case involved an arbitration). In *Feinstein* v. *Carl-Dress Corp., supra*, the court looked to the arbitration pleadings in determining what issues had been submitted to the arbitrator. If applied to the case at bar, *Feinstein* requires a finding that the registration issue was submitted to the arbitrators.

(2) **The Registration Issue was Decided in the Arbitration.** In arguing that the applicable doctrine is collateral estoppel rather than res judicata, American contends that the arbitration did not involve the same claims as the District Court action, because "In the arbitration, the 'claim' was that TCA was in default" (AA Brief 19-20). This is looking at the wrong claims. The pertinent arbitration claims are those of TCA, not Irish. This includes TCA's affirmative defenses as well as its counterclaim. See *Springs Cotton Mills* v. *Buster Boy Suit Co., supra.*

The claims asserted in the Answering Statement (insofar as they rely on alleged non-registrability of the Aircraft) are identical with those asserted in the first three causes of action of the amended complaint. For example, there is no difference in substance between the claim "that AET is not entitled to any remedies," as American characterizes its District Court claim (AA Brief 19-20), and TCA's arbitration request for a declaration that it "has no further obligations" under the Agreement (A 114). American "cannot 'escape the effect of the adverse determination by clothing the claim in a different garb * * *.'" *Goldstein* v. *Doft*, 236 F.Supp. 730, 734 (S.D.N.Y. 1964), *aff'd*, 353 F.2d 484 (2d Cir. 1965), *cert. den.* 383 U.S. 960 (1966).

In any event, the first three causes of action would be equally barred under the doctrine of collateral estoppel. The argument that the arbitrators did not necessarily decide the registration issue because the award does not specifically mention that issue, starts from the wrong end. The place to begin is not the award but the Answering Statement, which squarely raised the registration issue. The presumption is that an arbitration award covers all questions submitted to the arbitrators. *New York Lumber and Woodworking Co.* v. *Schneider*, *supra*, 119 N.Y. at 481.

The award found for Irish and against TCA, and dismissed TCA's counterclaim. The thrust of the affirmative defenses was that "regardless of whether such defaults occurred" Irish's claims were moot, and it was estopped from obtaining a declaration of default, because of its bad faith termination and because "the aircraft were not lawfully registrable in the United States" (A 112-113). Before they could find for Irish, the arbitrators necessarily had to consider and reject these affirmative defenses. See *Springs Cotton Mills* v. *Buster Boy Suit Co.*, *supra*, 88 N.Y.S.2d at 298.

Similarly, in dismissing TCA's counterclaim the arbitrators necessarily had to consider both grounds of that counterclaim. One of these grounds was that "the aircraft were not lawfully registrable in the United States" (A 114).

The dismissal of a claim in arbitration is a dismissal on the merits. The rules relating to the effect of dismissals in court actions do not apply to arbitrations. *Springs Cotton Mills* v. *Buster Boy Suit Co., supra,* 88 N.Y.S.2d at 297-298.

If there were any question of whether the arbitrators decided the counterclaim (which there is not), it would be effectively disposed of by the arbitrators' concluding statement that the award "is in full settlement of all claims and counterclaims submitted to this Arbitration" (A 205). This Court apparently does not share American's view that this "boilerplate" language "adds nothing" (AA Brief 23, fn.). See *Ritchie* v. *Landau, supra,* 475 F.2d at 154; *accord, Zinger* v. *Rolling Hills Realty Corp.,* 224 N.Y.S.2d 40, 42 (Sup. Ct. Nassau Co. 1961) (not officially reported).

B. *Fourth Cause of Action.*

In attacking the District Court's dismissal of the fourth cause of action, American ignores the District Court's finding that the argument which forms the basis for this cause of action "was specifically addressed to the arbitrators" (A 265). There is ample support in the record for this finding. In paragraphs "5" and "6" of the Answering Statement, TCA asserted defenses of estoppel based, *inter alia,* on Irish's "bad faith in terminating the Agreement" (A 112-113). In paragraph "8", TCA stated it was "entitled to a declaration that AET in bad faith terminated the Agreement" (A 114). In the counterclaim, one of the two grounds for the requested affirmative relief was stated to be "by reason of AET's conduct as described above" (A 114).

Similarly, in its Post-Hearing Memorandum American argued that it was entitled to a refund of its advance payments, with interest, "because AET wrongfully terminated the Agreement" (A 118).

There is no merit to the argument that the arbitrators did not decide Irish had "a legal right to terminate", or that this question was not addressed to the arbitrators (AA Brief 42). No meaningful distinction can be drawn between

a claim that Irish "wrongfully terminated the Agreement" (A 118), and a claim that Irish did not have "a legal right to terminate" (AA Brief 42). In both cases, the claim is asserted as a basis for relieving TCA or American from their obligations under the Agreement. "A shift in legal theories or a new or different ground for relief sought does not of itself work magic and dissolve the defense of res judicata." *Goldstein* v. *Doft, supra,* 236 F.Supp. at 734.

The contention that the "causation" argument was not directed to the arbitrators ignores the fact that the crux of the causation argument is Irish's alleged "wrongful termination," and that the factual allegations which form the basis of this causation argument were presented to the arbitrators. The conclusory allegation of lack of causation in paragraph "29" of the amended complaint, is based on the following factual allegations: that TCA's defaults were "neither material nor substantial" (¶ 27); and that TCA attempted to remedy these defaults and Irish rejected these tenders (¶ 28). The same factual allegations were made in the Answering Statement (¶¶ 1(b), 2(b), 4(a) and 5), and there relied on as one of the two bases for the requested declaration that TCA "has no further obligations under the Agreement" (A 114).

The same proof was required to support these factual allegations in the arbitration as would have been required in the District Court action. This is sufficient. See *Goldstein* v. *Doft, supra; Cohen* v. *Dana,* 83 N.Y.S.2d 414, 419 (Sup. Ct. Kings Co. 1948), (not officially reported) *aff'd,* 275 App. Div. 723, 87 N.Y.S.2d 614 (2d Dept. 1949), *aff'd,* 300 N.Y. 608, 90 N.E.2d 65 (1949).

Even if the question of Irish's "substantive right to terminate" had been excluded from the arbitration, as American argues (AA Brief 42), the fact is that this question—raised *by TCA,* not Irish—was submitted to the arbitration and there determined. A similar argument was rejected in *Goldstein* v. *Doft, supra,* where the court noted that the plaintiff "having himself framed the isues, . . . cannot now avoid them." 236 F.Supp. at 734. Moreover, this argument flies in the face of the following holding of

the New York Supreme Court, in its decision denying a stay of arbitration and declaratory judgment (A 89-91):

> "In what amounts to a second cause of action, petitioner seeks a declaratory judgment 'that AET wrongfully terminated and repudiated the agreement' and that by reason thereof, petitioner is under no obligation to AET thereunder and is entitled to certain damages thereunder.
>
> "This claim is covered by the arbitration clause and is for the arbitrator to determine."

The causation argument also ignores the fact that this is not an action for damages,* and that Irish's rights and obligations following termination are fixed by the Agreement.

C. *Waiver.*

If the claims asserted in the first four causes of action had not been raised in the arbitration, they would have been waived:

(1) *Fourth Cause of Action.* In the case of the fourth cause of action, which asserts that Irish's termination was "improper and unconscionable," such waiver would result from TCA's assertion of this claim in its pre-arbitration petitions for a stay of arbitration and declaratory judgment, and the State court's holding that "This claim is covered by the arbitration clause and is for the arbitrator to determine" (A 91).

(2) *First Three Causes of Action.* In the case of the first three causes of action, which assert non-registrability of the Aircraft, such waiver would result from TCA's failure to assert such non-registrability of the Aircraft in the same pre-arbitration petitions. TCA knew that Irish intended to use an arbitration finding of default as a basis for seeking to collect its rents under Section 9.2 of the Agreement. TCA and American so contended in the arbitration (A 113,

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* In any event, "causation" is a tort concept, and does not apply to actions for breach of contract.

118). In addition, in its notice of termination, Irish stated that it was "reserving all remedies available to us under said agreement" (A 68). TCA was aware of the registrability argument when it applied for a stay of arbitration and declaratory judgment. If federal law and public policy preclude Irish from using the arbitrators' findings of default as a basis for collecting rents under the Agreement, the same law and public policy precluded Irish from seeking such findings of default in the first instance.

TCA's failure to assert non-registrability of the Aircraft on its petitions for a stay of arbitration and declaratory judgment is highlighted by the fact that two of the claims of default (failure to execute the Initial Period lease; and failure to use best efforts to obtain all required registrations and approvals of governmental agencies) directly related to the issue of registrability. If these two defaults were "immaterial" because "the contract is impossible lawfully to perform," as American now contends (AA Brief 25), this contention should have been asserted as a basis for staying any arbitration of such defaults, and as a basis for the requested declaratory judgment that TCA had no further obligations under the Agreement.

D. *There Were no Disputed Facts.*

Throughout its brief, and particularly in Points I-A and I-B thereof (AA Brief 16-23), American contends that the District Court resolved "disputed" facts against it in granting summary judgment to Irish. This is not so. The only material facts necessary to the District Court's decision were: (1) the Agreement; (2) TCA's pre-arbitration petitions for a stay of arbitration and declaratory judgment; (3) Irish's arbitration demands; (4) TCA's Answering Statement; and (5) the arbitration award. These facts were all documentary, unambiguous, and undisputed. The District Court correctly granted summary judgment on the basis thereof. See *Universal Fiberglass Corp.* v. *United States,* 400 F.2d 926, 928-929 (8th Cir. 1968).

II.

Having affirmatively submitted the registration issue to arbitration, American cannot attack the arbitrators' determination of that issue. In any event, the arbitrators' determination cannot be collaterally attacked in a declaratory judgment action.

A. *Voluntary Submission of the Registration Issue to Arbitration.*

If there is any merit to the claim that the Aircraft were not lawfully registrable in the United States, that claim should have been asserted in TCA's petitions for a stay of arbitration and declaratory judgment. TCA not only neglected to do so, but in addition it proceeded to assert that claim—affirmatively—in the arbitration. Having done so, and being under no compulsion to do so, its submission of this issue to the arbitrators was "in effect an agreement to settle the dispute" with respect to this issue. *Coenen* v. *R. W. Pressprich & Co.*, 453 F.2d 1209, 1215 (2d Cir. 1972), *cert. denied*, 406 U.S. 949 (1972). See also *Cobb* v. *Lewis*, 488 F.2d 41 (5th Cir. 1974).

In *Coenen*, this Court held that even though the plaintiff's claims for violation of the Securities Exchange Act of 1934 and violation of the Sherman and Clayton Acts would ordinarily not be subject to arbitration, nevertheless the plaintiff's agreement to arbitrate these questions, made after the dispute arose, was enforceable. (With respect to the claimed violation of the securities laws, there were also alternative bases for the decision. With respect to the claimed violation of antitrust laws, the Court stated: "We base our affirmance squarely on this ground." 453 F.2d at 1215.) In *Cobb*, the Fifth Circuit followed the *Coenen* rule but found that the plaintiff had not made "an informed, deliberate and explicit decision to have his antitrust claims arbitrated." 488 F.2d at 49. (The plaintiff had initially raised the antitrust issue in his arbitration counterclaim, but within ten days thereafter he had rejected arbitration and brought his action in the District Court).

Here, TCA went further than the parties who were seeking to avoid arbitration in *Coenen* and *Cobb*: (1) it sought no stay of arbitration on the ground of non-registrability of the Aircraft, and (2) it affirmatively submitted and litigated the registration issue in the arbitration. By the very act of submitting the registration issue to arbitration, TCA acknowledged that the determination of that issue could go either way, and that it would be bound by that determination.

We submit that under these circumstances, American is now barred from attacking the arbitrators' determination of the registration issue on any grounds (particularly where there is no relationship between any non-registrability of the Aircraft and American's contractual liability under Section 9.2). A party may not "simply go along with the arbitration proceeding, hoping for a favorable award, but secure in the knowledge that any award may be attacked successfully in court if it should prove unfavorable." *Cobb* v. *Lewis, supra,* 488 F.2d at 49.

B. *The Arbitrators' Determination of the Registration Issue Could Not be Attacked in a Declaratory Judgment Action.*

Even if American were free to attack the arbitrators' determination of the registration issue on the ground that the determination was contrary to federal aviation law and public policy (which it was not free to do), it could not do so by means of a declaratory judgment action. "[T]he only method of attacking or reviewing an award is by motion to vacate, modify or correct it for the reasons mentioned in the statute." *Matter of Wilkins,* 169 N.Y. 494, 62 N.E. 575, 576 (1902), quoted with approval in *Raven Electric Co.* v. *Linzer,* 302 N.Y. 188, 192, 97 N.E.2d 746, 747 (1951); *cf. Sobel* v. *Hertz, Warner & Co.,* 469 F.2d 1211 (2d Cir. 1972); *Travelers Ins. Co.* v. *Davis,* 490 F.2d 536 (3d Cir. 1974).* This in itself is a sufficient ground for

* American belatedly recognized this requirement when it raised the registration and public policy issues in its motion for reconsideration of the confirmation motion (A 226-233). On June 4,

upholding the District Court's dismissal of the first three causes of action, and also the fourth cause of action.

The District Court's dismissal of the declaratory judgment action is supportable on two other grounds: (1) Its predecessor having chosen the State court as the forum for matters relating to the arbitration, American was required to assert any challenge to the arbitration award (including any challenge to the arbitrators' determination of specific issues) in the same forum, and was not free to switch to the District Court (A 48-51). See New York Civil Practice Law & Rules § 7502(a); *Marchant* v. *Mead-Morrison Mfg. Co.*, 29 F.2d 40 (2d Cir. 1929), *cert. denied*, 278 U.S. 655 (1929); *Victorias Milling Co.* v. *Hugo Neu Corp.*, 196 F.Supp. 64, 67 (S.D.N.Y. 1961). (2) The amended complaint, when read in the light of the Agreement and the arbitration award (both of which are incorporated by reference therein), fails to state any claim upon which relief can be granted (A 3-10, 45-48, 125-139).

III.

Having deliberately departed from the contractually prescribed procedure for determining registrability, American is estopped from seeking to avoid liability under the Agreement on the ground that the Aircraft were not registrable.

A. *The Agreement Prescribed the Exclusive Procedure for Determining Registrability.*

The parties realized that there could be a problem with registration, and agreed on a detailed procedure for registering the Aircraft. Both parties thus assumed certain risks with respect to registration. Irish assumed the risk that

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1973, six months prior to Judge Wyatt's decision, the State court denied the reconsideration motion, stating: "The Court is not persuaded that its original determination should be changed." (Memorandum decision of Chimera, J.).

if the prescribed procedure was followed and TCA was unable to register the Aircraft, the entire Agreement would terminate and TCA would be entitled to a refund of its advance payments. TCA assumed the risk that if it failed to follow the prescribed registration procedure, it would remain liable for the rent even if the Aircraft could not be registered.

This risk was assumed in a complicated commercial agreement, where both parties were represented by counsel. It was a bargained-for risk. American is bound thereby. *Day* v. *United States,* 245 U.S. 159 (1917).

American contends that if other methods of attacking or determining registrability were meant to be excluded, the Agreement should have so stated. There is no such requirement. *Expressio unius est exclusio alterius.* See *Southern Coast Corp.* v. *Sinclair Refining Co.,* 181 F.2d 960, 961 (5th Cir. 1950).

The argument that ambiguities in a document cannot be resolved on a summary judgment motion (AA Brief 25), is not applicable here. It is the plain lack of any ambiguity in the Agreement which is American's undoing. "Contracts are not rendered ambiguous by the mere fact that the parties do not agree upon their proper construction." *Whiting Stoker Co.* v. *Chicago Stoker Corp.,* 171 F.2d 248, 250-251 (7th Cir. 1948).

The lack of any ambiguity in the registration provisions also precludes American from questioning the reasonableness of these provisions, or speculating on the intent of the parties. "When the terms of a written contract are clear and unambiguous, the intent of the parties must be found therein." *Nichols* v. *Nichols,* 306 N.Y. 490, 496, 119 N.E.2d 351, 353 (1954).

The Agreement could have provided that there would be an application to the FAA for an advance opinion on registration of the Aircraft, or that either party was free to seek such an opinion at any time prior to the delivery of the first Aircraft. It does not so provide. The Agreement

could have provided that its effectiveness was conditional on the Aircraft being lawfully registrable in the United States, without requiring any attempt to register the Aircraft and without requiring best efforts on the part of TCA. It does not so provide.

Whatever the wisdom or reasonableness of the registration provisions, this is what the parties bargained for. The Court cannot write a more reasonable agreement for the parties. See *Ruth* v. *S.Z.B. Corp.*, 2 M.2d 631, 153 N.Y.S.2d 163, 168 (Sup. Ct. N.Y. Co. 1956), *aff'd*, 2 A.D.2d 970, 158 N.Y.S.2d 754 (1st Dept. 1956).

B. *"Causation" Has Already Been Determined.*

The contention that TCA's defaults were immaterial, because the Aircraft were not lawfully registrable in the United States, was also raised as a defense in the arbitration and there rejected. In addition, this contention ignores the fact that two of these defaults also constitute a failure to comply with the very registration procedures which are a condition precedent to American being relieved of its liability for rent.

The contention that a breach of contract is immaterial "if the contract is impossible lawfully to perform" is beside the point. The "performance" required of TCA was the payment of rent. This was the *quid pro quo* for Irish's furnishing of the Aircraft. TCA was not required to operate the Aircraft (TCA had a right of sublease to domestic carriers, and evidence was introduced in the arbitration that Irish would have permitted a sublease to foreign carriers, where U. S. registration would not have been necessary).

C. *American, not Irish, Foreclosed Compliance With the Registration Procedure.*

The argument that by terminating, Irish prevented the registration procedure from being followed (AA Brief 26-27), ignores the fact that TCA had already violated and

repudiated the registration procedure at the time Irish terminated.

There are two answers to the argument that Irish should not be permitted, by terminating, to "avoid the registration issue" and "sue for all the rents as if the aircraft could have been lawfully registered in the United States" (AA Brief 27): (1) The registration issue has not been avoided; it has been resolved in the arbitration. (2) The District Court's decision does not have the effect of permitting Irish to sue for all the rents "as if the aircraft could have been lawfully registered in the United States." The effect of that decision is merely to permit Irish to treat the Agreement as if there had been Events of Default, and as if Irish had exercised its right to terminate because of such Events of Default. It is American, not Irish, who is seeking a windfall.

D. ***American is Bound by TCA's Warranties, Representations and Covenants.***

If American were not otherwise barred from seeking to avoid liability under the Agreement on the ground of alleged non-registrability of the Aircraft (which it is), it would be so barred by virtue of TCA's representations, warranties and covenants. TCA represented, warranted and covenanted that the Agreement and any lease entered into thereunder were valid and binding on TCA and enforceable in accordance with their terms; that neither the Agreement nor any such lease contravened any law or regulation; and that it would use its best efforts to obtain any required registrations with or approvals of government agencies.

If TCA thought there was a serious registration problem, it was free to seek an FAA opinion prior to entering into the Agreement. It was also free to break off negotiations. It did neither. Instead, it not only entered into the Agreement but also made the foregoing representations, warranties and covenants. American, as TCA's successor, is estopped from asserting the falsity of these representa-

tions, warranties and covenants—six years later—as a basis for being relieved of its obligations under the Agreement. See *United States* v. *Merchants Mutual Bonding Co.*, 220 F.Supp. 163, 179 (N.D. Iowa 1963), *appeal dismissed* 332 F.2d 731 (8th Cir. 1964).

IV.

The Agreement does not contravene the Federal Aviation Act or public policy, and non-registrability of the Aircraft would not relieve American of its liability thereunder.

A. *The Aircraft Were Registrable.*

Registrability of the Aircraft is not an issue on this appeal. However, since American focuses on registration in its brief, it is worth noting that registration of the Aircraft was not prohibited by the Federal Aviation Act and would not have violated public policy.

Section 501 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1401, provides in pertinent part:

"§ 501.

"(a) It shall be unlawful for any person to operate or navigate any aircraft eligible for registration if such aircraft is not registered by its owner as provided in this section, or (except as provided in section 1108 of this Act) to operate or navigate within the United States any aircraft not eligible for registration:

• • •

"Eligibility for registration

"(b) An aircraft shall be eligible for registration if, but only if—

(1) It is owned by a citizen of the United States and it is not registered under the laws of any foreign country; or

• • •

"Issuance of certificate

"(c) Upon request of the owner of any aircraft eligible for registration, such aircraft shall be registered by the Administrator [of the Federal Aviation Administration] and the Administrator shall issue to the owner thereof a certificate of registration. • • •

• • •

"Effect of registration

"(f) Such certificate shall be conclusive evidence of nationality for international purposes, but not in any proceeding under the laws of the United States. Registration shall not be evidence of ownership of aircraft in any proceeding in which such ownership by a particular person is, or may be, in issue."

Pursuant to the authority conferred by Section 313(a) of the Act, 49 U.S.C. § 1354(a), the Administrator of the FAA has issued Regulations. Part 47 of the Regulations, 14 C.F.R. Part 47, deals with aircraft registration. Section 47.5 of the Regulations, 14 C.F.R. § 47.5, provides in part:

"§ 47.5 Applicants.

• • •

"(b) An aircraft may be registered only by, and in the legal name of, its owner. However, section 501(f) of the Federal Aviation Act of 1958 (49 U.S.C. 1401(f)) states that registration is not evidence of ownership of aircraft in any proceeding in which such ownership by a particular person is in issue. The FAA does not issue any certificate of ownership or endorse any information with respect to ownership on a Certificate of Aircraft Registration. • • •

"(c) In this part, 'owner' includes a buyer in possession, a bailee, or a lessee of an aircraft under a contract of conditional sale, and the assignee of that person. • • •"

The term "contract of conditional sale" is not defined in the Regulations. "Conditional sale" is defined in Section 101 (16) of the Act, 49 U.S.C. § 1301(16), as follows:

> "(16) 'Conditional sale' means (a) any contract for the sale of an aircraft, aircraft engine, propeller, appliance, or spare part under which possession is delivered to the buyer and the property is to vest in the buyer at a subsequent time, upon the payment of part or all of the price, or upon the performance of any other condition or the happening of any contingency; or (b) any contract for the *bailment or leasing* of an aircraft, aircraft engine, propeller, appliance, or spare part, by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value thereof, and by which it is agreed that the bailee or lessee *is bound to become, or has the option of becoming,* the owner thereof upon full compliance with the terms of the contract. The buyer, bailee, or lessee shall be deemed to be the person by whom any such contract is made or given." (Emphasis supplied.)

If only true conditional sales were contemplated by the Act, as American contends, part "(b)" of the foregoing definition would be surplusage. Part "(a)" covers the true conditional sale. Part "(b)" covers something else. Nor does this definition lend any support to the contention that a lessee under a lease with option to purchase cannot become the "owner", and cannot register the aircraft, "unless and until it exercised the option and purchased or began to purchase the aircraft" (AA Brief 40-41). By definition, one who has an option has not yet exercised that option, and may never do so.

The term "substantially equivalent," as used in the foregoing definition, is not defined in the Act or Regulations. Nor is there any definition of "value." Presumably "value" means something different than fair market value, since the latter term was not used. In determining what is meant

by "value," a number of questions arise: (1) Is "value" determined as of the time the contract was entered into, or at the time the option is exercised? (1) Is it "value" to the lessor or to the lessee, or to a hypothetical third party? (3) What elements go into determining "value"? In the case at bar, for example, was an aircraft which TCA could acquire on 60 days notice more valuable than the same aircraft acquired from the manufacturer on two years notice?*

Faced with the ambiguous language of the statute, the FAA and its predecessor agencies have simply followed the practice of treating all leases with options to purchase as "contracts of conditional sale" for purposes of registration, and registering all such aircraft in the name of the lessee.** This was pointed out by American's own expert witness, when he added the following caveat in the written opinion he furnished to American (A 235-236):

> "One additional area of consideration is the possible existence of a present or *long-standing policy* of the Administration which is contrary to our opinion expressed above. * * * The Administration has, *as a matter of practice,* generally treated *all* leases containing options to purchase as conditional sales contracts

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* Evidence was introduced in the arbitration that in the past, air carriers had paid premiums of 25% or more of the purchase price of a new plane in order to acquire a favorable delivery position on the manufacturing line; that first generation jet aircraft, then several years old, had sold in the late 1950's for as much as they had cost new; that another carrier had bought used aircraft from Irish at prices substantially in excess of the original purchase price and the manufacturer's then current price, in order to acquire immediate delivery as opposed to waiting for delivery from the manufacturer; and that American itself had agreed to pay roughly 50% of the price of a new 747 for a mere 15-month lease of a 747 while waiting for delivery of new 747's from Boeing (A 240-241).

** The only exception to this practice has been in the case of institutional leases which are used as financing arrangements. These leases typically are for ten years or more, and contain an option to purchase the aircraft only at the end of the lease term. Commencing in 1967, the FAA at the request of the parties has permitted—but not required—such aircraft to be registered in the name of the lessor (A 121).

where they are filed with the Administration without any prior or accompanying request that a formal determination be made as to their legal effect." (Emphasis supplied.)

This practice is supported by practical considerations. The FAA's primary concern and function is one of aircraft safety. In enforcing its safety and maintenance regulations, it is preferable from the FAA's standpoint to have aircraft registered in the name of the party who is operating the aircraft. See, *e.g., Brown, Airman Certificate,* 1 C.A.A. 666, 669 (1940) (charge of failure to maintain log books not sustained, because "while it is clear from the record that the respondent was the owner of the aircraft in question, no showing was made that he was the *registered* owner"); *Conroy, Airman Certificate,* 5 C.A.B. 172 (1941). In the latter case, the Civil Aeronautics Board stated, 5 C.A.B. at 179:

> "The Civil Air Regulations place the obligation to maintain log-books squarely upon the *registered* owner of aircraft. *The fact that the registered owner may not be the beneficial owner* is not a mitigating circumstance. The *registered* owner has advisedly been designated as the person responsible in order to render impossible any evasion of this responsibility by complex devices of ownership." (Emphasis supplied.)

This consideration also entered into the CAA's decision in *Matter of O'Connor,* 1 C.A.A. 5 (1939), cited by American, where the CAA noted that the "obligations imposed by the Civil Air Regulations upon the registered owner [maintenance, inspection, log books, etc.] obviously belong to the owner *who is in actual possession and control of the aircraft*" (emphasis supplied). 1 C.A.A. at 6. *O'Connor* also noted that both parties were in agreement in wanting the aircraft registered in the name of the conditional vendee.

It was pursuant to this long-standing practice of the FAA, in treating the lessee as the "owner" for registration

purposes under all leases with options to purchase, that the prior Irish aircraft were registered when under lease to U. S. carriers, including TCA. And it is this practice which the parties relied on when they entered into the Agreement in 1968.

In view of the ambiguous language of the Act, this long-standing FAA practice is entitled to great weight in interpreting the statute. *United States* v. *Alabama Great Southern R.R. Co.*, 142 U.S. 615, 621 (1892); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294 (1933).

The Shienbrood letter provides no useful guide to interpretation of the statute. Giving it the benefit of every doubt, the letter is at best an advisory opinion, not a ruling. Viewed as such, it is not binding on the parties, the FAA, or the courts. See 1 Davis, *Administrative Law*, § 4.09 (1958); *North American Van Lines* v. *United States*, 277 F.Supp. 741, 746 (N. D. Ind. 1967). Even as an advisory opinion, in view of its inconsistency with long-standing practice and prior FAA opinions (A 120), it would be entitled to little weight in any judicial interpretation of the Act. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Considering the unusual circumstances under which it was requested and issued, the letter is to be viewed more with suspicion than reverence. *Cf. Rochester Park, Inc.* v. *City of Rochester*, 38 M.2d 714, 238 N.Y.S.2d 822, 827-828 (Sup. Ct. Monroe Co. 1963), *aff'd* 19 A.D.2d 776, 241 N.Y.S. 2d 763 (4th Dept. 1963).

The suggestion that the Agreement would enable Irish to receive revenues from domestic U. S. air commerce, is ridiculous on its face. It was TCA, a domestic carrier, who would be realizing revenues from domestic air commerce under the Agreement. These revenues did not form the basis for or otherwise relate to the rent to be paid by TCA. The same rent was payable regardless of the amount of revenues derived by TCA from use of the aircraft. It was payable even if TCA did not operate the aircraft.

No public policy would have been violated by TCA's operation of the aircraft. If anything, public policy was supported by the Agreement, since it enabled TCA, a relatively small domestic carrier, to effectively compete with much larger carriers (A 243). See 49 U.S.C. § 1302(b), (d).

American's reliance on maritime statutes and cases interpreting those statutes only serves to point up the weakness of its position. The maritime statutes *contain an express prohibition* against the use of foreign-owned or foreign-built vessels in coastwise trade. See *Marine Carriers Corp.* v. *Fowler,* 429 F.2d 702, cited at page 31 of American's brief. The draftsmen of the aviation statutes, which came later, had the maritime statutes available as a guide. That they chose not to include a similar prohibition in the aviation statutes, is the clearest evidence that no such prohibition was intended.

If any further evidence is needed that the alleged prohibition against the use of foreign-owned aircraft in U.S. air commerce is illusory, it is found in American's reference to Section 1108 of the Act, 49 U.S.C. § 1508 (AA Brief 34). The portion of this section quoted by American, states that "foreign civil aircraft" shall not engage in U.S. cabotage traffic. The Regulations under Section 1108 are found in Part 375 of the Civil Aeronautics Board Regulations, 14 C.F.R. Part 375. Section 375.1 of these Regulations reads, in pertinent part:

"§ 375.1 Definitions.

"As used in this part:

• • •

" 'Foreign civil aircraft' means an aircraft of foreign *registry* which is not part of the armed forces of a foreign nation. * * *" (Emphasis supplied.)

A number of events and documents are inconsistent with, or flatly contradict, American's assertion that federal law

and public policy bar even "a U.S. citizen from using a foreign-owned aircraft on U.S. cabotage routes" (AA Brief 36):

1. All of the prior leases of Irish aircraft to U.S. carriers were accepted by the FAA, even though it was obvious on the face of these leases that foreign-owned aircraft were involved and that the lessees were not "in the process of purchasing the aircraft."

2. Even the FAA's legal personnel in Oklahoma City were apparently not aware of this prohibition, since FAA Center Counsel and his assistant at the FAA Aeronautical Center (of which the Aircraft Registry is a part) gave a verbal opinion that the Aircraft were registrable.

3. The Shienbrood letter does not mention the prohibition against registration of foreign-owned aircraft in the United States. If there were such a prohibition, the letter could have disposed of the registration question in one sentence.

4. American itself apparently was not aware of this prohibition, since it offered to proceed with the Agreement if Irish would simply agree to a 75% reduction in the term (A 106, 247).

B. *Non-Registrability of the Aircraft Would Not Relieve American of its Contractual Obligations.*

Even if American were right on the law (and apart from any questions of waiver or estoppel), this does not mean that American is—or should be—relieved of liability under the Agreement:

(1) Under the terms of the Agreement, non-registrability of the Aircraft does not in itself relieve TCA from its continuing liability for rent. There must be compliance with the registration provisions, and it has been determined by the arbitrators that TCA did not comply with these provisions.

(2) Public policy would not preclude giving effect to the award. As American conceded in the District Court, "the Agreement was not unlawful, because it provided by its own terms that it would terminate if the aircraft could not lawfully be registered" (A 176). Similarly, the arbitrators' ruling on the registration issue does not require the doing of an illegal act. See *National Equipment Rental Ltd.* v. *American Pecco Corp.*, 35 A.D. 2d 132, 314 N.Y.S. 2d 838 (1st Dept. 1970), aff'd 28 N.Y. 2d 639, 320 N.Y.S. 2d 248, 269 N.E. 2d 37 (1971). Neither the Agreement nor the award requires TCA to operate the Aircraft in domestic commerce, or to register the Aircraft (as opposed to using "best efforts" to register the Aircraft).

(3) If the FAA would not have registered the Aircraft in November 1970, as American contends, this would have represented an abrupt change in the FAA's long-standing interpretation of the statute (A 120). As such, it cannot serve as a basis for relieving American of its obligations under an agreement entered into several years prior thereto, when the FAA interpreted the statute so as to permit registration. See *United States* v. *Alabama Great Southern R.R. Co., supra; United States* v. *Finnell,* 185 U.S. 236 (1902).

No law or public policy is violated by holding American, as successor to TCA, to its contractual commitment. If anything, it would violate public policy if American were permitted to avoid this contractual commitment by asserting that which its predecessor could have asserted (but did not) six years ago, prior to entering into the Agreement.*

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* American's suggestion that the Agreement was for practical purposes "executory" at the time of termination (AA Brief 29, fn.), is not well founded. The Agreement was in force for 2½ years. Planning in the airline industry is a long-range proposition (A 240-241). TCA received substantial benefit from having a firm commitment for the Aircraft during this period, knowing that it would be able to effectively compete with much larger carriers, and being able to base its plans accordingly (A 243). In addition, TCA had several route applications pending before the Civil Aeronautics Board during this period, in which it proposed to serve the new routes with 747's (A 241).

V.

Section 9.2 of the Agreement, which gives Irish substantially the same relief it would have as a matter of law, is not a penal provision.

In negotiating the Agreement, TCA negotiated and agreed to the specific circumstances under which there would be deemed to be an "Event of Default." It also negotiated and agreed to the scope of Irish's remedies on the occurrence of an Event of Default, and limitations on those remedies. It is these remedies, negotiated with the aid and advice of counsel, which TCA's successor now asserts are unenforceable.

Irish's right under Section 9.2.F to continue to collect the rents as they fall due, subject to a credit for amounts received on reletting, is nothing more than what it would be entitled to receive as damages in the absence of such a clause. See *812 Park Ave. Corp.* v. *Pescara,* 268 App. Div. 436, 51 N.Y.S.2d 538 (1st Dept. 1944), *rearg. den.,* 52 N.Y.S.2d 800 (1945), *aff'd* 294 N.Y. 792, 62 N.E.2d 234 (1945). The only possible difference is that TCA's credits are not computed and paid until the end of the original term. It was competent for the parties to so agree. See *Kottler* v. *New York Bargain House,* 242 N.Y. 28, 37, 150 N.E. 591, 593 (1926).

The 50%, across-the-board credit for use in Irish's own operations is reasonable and fair, and a practical necessity. The difficulties in determining whether such use is profitable or unprofitable, and attempting to measure the amount of such profit or loss, are manifest. *Cf. Ward* v. *Hudson River Bldg. Co.,* 125 N.Y. 230, 26 N.E. 256 (1891).

The provision whereby Irish is not responsible or liable for failure to relet the Aircraft is similar to that found in the standard apartment lease. See, *e.g.,* Record, p. 45, *812 Park Ave. Corp.* v. *Pescara, supra* (lease contained a provision that "landlord shall in no event be liable in any way whatsoever for failure to re-let the demised prem-

ises"). In the absence of any contrary provision in the lease, a lessor of real property is under no duty to mitigate damages. *Sancourt Realty Corp.* v. *Dowling,* 220 App. Div. 660, 222 N.Y. Supp. 288 (1st Dept. 1927).

American's reliance on *884 West End Ave. Corp.* v. *Pearlman,* 201 App. Div. 12, 193 N.Y. Supp. 670, *aff'd,* 234 N.Y. 589 (1922), is misplaced: (1) There is no valid basis for extending the reasoning of *884,* which involved a non-negotiated apartment lease, to a negotiated equipment lease between two commercial parties of equal bargaining power. (2) The lease in *884* provided for acceleration of the entire rents upon a default, and there was no notice provision and no right to cure inadvertent defaults. The Agreement in the case at bar has none of these features. (3) If *884* has not been overruled *sub silentio,* at the very least the holding of that case has been narrowly confined to the specific facts involved there. See, *e.g., 812 Park Ave. Corp.* v. *Pescara, supra; International Publications, Inc.* v. *Matchabelli,* 260 N.Y. 451, 184 N.E. 51 (1933).*

While this Court followed *884* in *In re Barnett,* 12 F.2d 73 (1926), which also involved an acceleration clause, it later expressed reservations as to the continuing validity of *Barnett* as an accurate statement of New York law, and declined to extend *Barnett* to a lease which did not involve an acceleration clause (although the Court did not focus on the presence or absence of an acceleration clause). *In re Homann,* 45 F.2d 481, 483 (1930).

Section 9.2.F is not a liquidated damages provision. The liquidated damages provision is found in Section 9.2.G (A 23b). Under the latter clause, Irish may recover the excess of the remaining rent over the fair and reasonable

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* The lease in *International Publications,* Record pp. 12-24, was almost as onerous as in *884.* There was the same type of provision whereby defaults great and small, including violations of the landlord's rules and regulations, gave the landlord the right to terminate. There was a notice provision, but no apparent right to cure defaults during the notice period. The essential difference from *884* was the absence of an acceleration clause.

net rental value of the Aircraft, discounted at the rate of 6% per annum applied semi-annually. This clause invokes no penalty. It is clear evidence that the provisions of Section 9.2 were carefully negotiated and bargained for by TCA.

The argument that TCA's defaults "did not cause AET any damages," is not available to American: (1) An action to enforce Section 9.2.F would be one for rent, not damages. (2) Proximate cause is a tort concept, and does not apply to contract actions. (3) TCA having agreed that its liability to pay rent would continue upon termination, American as its successor is bound by this provision. *Mann* v. *Munch Brewery,* 225 N.Y. 189, 121 N.E. 746 (1919); *International Publications* v. *Matchabelli, supra.*

Judge Wyatt correctly held that TCA's warranties precluded American from asserting unenforceability of Section 9.2.* By these warranties—which were also representations and covenants—TCA acknowledged and represented to Irish that it considered itself legally bound by all provisions of the Agreement, and that it would not later challenge these provisions. Irish relied on these statements in entering into the Agreement, and thereby gave up the opportunity to lease the then extremely popular 747's (A 237) to other carriers.

If TCA considered the provisions of Section 9.2 "punitive" or "oppressive" it was free not to enter into the Agreement, or to bargain for better terms. As to the argument that TCA did not know the circumstances under which Irish "would" enforce these remedies (AA Brief 46), the answer is that TCA knew—and agreed to—the circumstances under which Irish *could* enforce these remedies. "What may be the situation after the contract is not to invalidate what the parties clearly agreed to beforehand."

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* There is no merit to, and no justification for, the suggestion at page 45 of American's Brief that the warranties in Section 11.2 apply only to the individual leases and not to the Agreement itself, or that the District Court so construed them.

In re Lion Overall Co., 55 F.Supp. 789, 791, *aff'd sub nom. United States* v. *Walkof*, 144 F.2d 75 (2d Cir. 1944).

TCA agreed to these provisions, and made affirmative representations, warranties and covenants as to their validity, enforceability and binding effect. Having done so, at a time of industry prosperity, its successor is estopped from asserting the unenforceability of these provisions six years later, at a time of industry recession. See *Wolfe* v. *Security Fire Insurance Co.*, 39 N.Y. 49 (1868); *Rothschild* v. *Title Guarantee & Trust Co.*, 204 N.Y. 458, 464, 97 N.E. 879 (1912); *United States* v. *Merchants Mutual Bonding Co., supra*, 220 F.Supp. at 179.

Even if there were some public policy involved (which there clearly is not), this would not automatically remove the bar of estoppel. There is "no cogent consideration hindering the use of estoppel in appropriate circumstances against a party claiming the benefit of a statute and public policy in a private transaction." *Airborne Freight Corp.* v. *Irving Trust Co.*, 26 A.D.2d 507, 275 N.Y.S.2d 863, 867 (2d Dept. 1966). See also *Mason* v. *Anthony*, 3 Keyes 609 (N.Y. 1867).

The estoppel here applies equally to American's attempt to assert unenforceability of Section 9.2, and to its attempt to assert non-registrability of the Aircraft. In both cases, the estoppel is compounded by the merger. Just as TCA was free not to enter into the Agreement, American was free not to enter into the merger. When it negotiated the merger American was aware of the Agreement, which represented TCA's largest liability (A 106). The Agreement was a liability in fact as well as a matter of accounting, since by then the industry was already in a recession and American was about to receive surplus 747's it had ordered several years previously. American, fully aware of the provisions of Section 9.2 and fully aware that foreign aircraft were involved, agreed to assume this liability.* Presumably

* Despite its right to abandon the merger (A 106), American thereafter proceeded with the merger after Irish had terminated, knowing that Irish was seeking an arbitration finding of default as a basis for collecting its rents.

the price which it agreed to pay for TCA, and which TCA agreed to accept, took this liability into account. To permit American to now walk away from this liability would be tantamount to unjust enrichment.

An additional element of estoppel, or waiver, with respect to the claim asserted in the fifth cause of action is created by TCA's failure to assert this claim in its pre-arbitration petitions in the State court. As previously noted, TCA was aware that Irish intended to use a finding of default in the arbitration as a basis for enforcing its remedies under Section 9.2. In its petitions, TCA referred to "some of" these remedies as being "unconscionable." Any claim that these remedies were unenforceable under New York law should have been asserted then, as a ground for the requested stay of arbitration and declaratory judgment. The failure to do so constituted a waiver of this claim.

VI.

The District Court would not have abused its discretion in declining jurisdiction of the action.

It would have been a permissible exercise of the District Court's discretion to decline jurisdiction. "[A] trial court's decision to exercise declaratory jurisdiction is a discretionary one." *Muller* v. *Olin Mathieson Chemical Corp.*, 404 F.2d 501, 505 (2d Cir. 1968); *accord, Brillhart* v. *Excess Insurance Co. of America*, 316 U.S. 491, 494 (1942). See also *Public Service Comm'n of Utah* v. *Wycoff Co.*, 344 U.S. 237, 241 (1952).

Broadview Chemical Corp. v. *Loctite Corp.*, 417 F.2d 998, cited at page 48 of American's Brief, is not in point. In addition to the fact that *Broadview* involved a threatened claim of patent infringement, where declaratory judgment jurisdiction is more liberally entertained, American faced no such dilemma as that of the plaintiff in *Broadview*. It was engaged in no conduct which would either cease or continue depending on the outcome of

the declaratory judgment action. In addition, the controversy, if any, was promptly brought to a head by the commencement of Irish's rent action in the District Court in early July 1973, five months prior to dismissal of the declaratory judgment action.

VII.

The appeal from the order on reargument should be dismissed.

A. *Dismissal.*

Irish hereby renews its motion to dismiss American's purported appeal from the reargument order. The memorandum which American submitted in support of reargument cited a number of new alleged facts which were not before the District Court on the original motion. This was improper. See S.D.N.Y. Gen. R. 9(m); *cf. Parmett* v. *Concord Hotel, Inc.*, 9 A.D.2d 767, 192 N.Y.S.2d 521 (2d Dept. 1959). The only apparent purpose in appealing from the reargument order was to make these additional "facts" part of the record on appeal. American has included the bulk of its memorandum in the printed Appendix, and its brief makes extensive reference to the alleged facts cited therein. The brief asserts no error with respect to the order on reargument.

The appeal from the order on reargument should be dismissed, and the reargument papers expunged from the record.

B. *Affirmance.*

If the appeal from the reargument order is not dismissed, the reargument order should be affirmed. The memorandum in support of reargument pointed to no "matters or controlling decisions" which the District Court had "overlooked", see S.D.N.Y. Gen. R. 9(m), and American asserts no error in the District Court's order on reargument.

As to American's assertion on reargument, and on appeal, that Judge Wyatt failed to deal with the contention that the arbitrators' determination was contrary to federal law and public policy, since Judge Wyatt granted reargument and "on reconsideration . . . approved and confirmed" his original decision (A 326), any possible failure to consider this contention on the original motion was cured.

CONCLUSION

The judgment of the District Court should be affirmed, with costs. The appeal from the order on reargument should be dismissed; alternatively, the order on reargument should be affirmed.

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September 6, 1974.

Respectfully submitted,

SMITH, STEIBEL & ALEXANDER
Attorneys for Defendant-Appellee
460 Park Avenue
New York, New York 10022
751-2660

LUDWIG A. SASKOR
STUART B. FISHER
Of Counsel

Service of 1 copies of this within
Brief is admitted this
6 day of September 1974
Osborne & Christensen, Jr.
ATTORNEY FOR Plaintiff-Appellant

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